Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-205

Eugene Vernon Harris,

Petitioner,

v.

Commonwealth of Virginia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

George Wm. Warren, IV
HALL, HALL & WARREN
1001 East Main Street
Richmond, Virginia 23219
Counsel for Petitioner

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provisions and Statutes Involved	3
Statement of Case	4
Reasons for Granting the Writ	11
Conclusion	21
Certificate	22
Appendix	23
Decision of the Supreme Court of Virginia	1-a
Judgment of the Circuit Court of the City of Richmond, Division I	2-a
Constitution of the United States of America, Sixth Amendment	3-a
Constitution of the United States of America, Fourteenth Amendment	3-a
Virginia Habitual Offender Act, Section 46.1-387.1, et seq of the 1950 Code of Virginia, as amended	4-a
Notice of Appeal and Assignments of Error	5-a
Record of Trial Court Proceedings	6-a

TABLE OF AUTHORITIES

CASES	PAGE
Argersinger v. Hamlin, 407 U.S. 25 (1972)	Throughout
Berry v. City of Cincinnati, 414 U.S. 29 (1973)	Throughout
Clay v. Wainwright, 470 F.2d 478 (5th Cir.1973)	13,19
Cottle v. Wainwright, 477 F.2d 269 (5th Cir.1973) and 493 F.2d 397 (5th Cir.1974)	17
Ferguson v. Gathright, 485 F.2d 504 (4th Cir.1973)	13
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	19
Gideon v. Wainwright, 372 U.S. 335 (1963)	12,16
Ginsberg v. New York, 390 U.S. 629 (1968)	16
Loper v. Beto, 405 U.S. 473 (1966)	18
Marston v. Oliver, 485 F.2d 705 (4th Cir.1973)	13,15
Mays v. Harris, ___F.2d___, (4th Cir. 1975; Docket No. 74-1409) reversing 369 F.Supp. 1348 (W.D.Va.1973)	14,16,19
Mempha v. Rhay, 389 U.S. 128 (1967)	19
O'Shea v. United States, 491 F.2d 774 (1st Cir.1974)	18
Sibron v. New York, 392 U.S. 410 (1968)	18
Whorley v. Commonwealth, 215 Va. ____, 215 S.E.2d____(1975)	14,17,19

Statutes

Section 46.1-387.1 et seq, 1950 Code of Virginia, as amended	4
28 U.S.C. 1257(3)	3

Constitutional Authority

Constitution of the United States of America, Sixth Amendment	3
Constitution of the United States of America, Fourteenth Amendment, Section Six	3

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW your petitioner, Eugene Vernon Harris, by his counsel, George Wm. Warren, IV, and presents his petition for the issuance of a Writ of Certiorari to the Supreme Court of Virginia.

OPINIONS BELOW

The decision of the Supreme Court of Virginia which is the subject of the instant proceeding is Record Number 741080. As yet unreported officially or unofficially, its citation will be 215 Va._____, 214 S.E.2d_____(1975). It is included herein at page 1-a of the appendix, infra.

The judgment of the Circuit Court of the City of Richmond, Division I, which was the basis for petitioner's unsuccessful appeal is unreported, and appears herein, beginning at page 2-a of the appendix, infra.

JURISDICTION

The judgment of the Supreme Court of Virginia complained of here was entered on May 9, 1975.

The jurisdiction of this Court to review that judgment is conferred by Title 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

WHETHER A CITIZEN MAY PROPERLY BE ADJUDGED AN HABITUAL OFFENDER WHEN SUCH JUDGMENT DEPENDS MATERIALLY UPON TWO VOID MISDEMEANOR CONVICTIONS OBTAINED WITHOUT THE ASSISTANCE OF COUNSEL, AND WHICH RESULTED IN TERMS OF IMPRISONMENT.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I

Constitution of the United States of America, Sixth Amendment -- reproduced infra, at page 3-a of the appendix.

II

Constitution of the United States of America, Fourteenth Amendment, Section Six -- reproduced infra, at page 3-a of the appendix.

III

Virginia Habitual Offender Act, Section 46.1-387.1 et seq of the 1950 Code of Virginia, as amended -- reproduced infra, beginning at page 4-a of the appendix.

STATEMENT OF THE CASE

On January 14, 1969, Eugene Vernon Harris, petitioner herein, then nineteen years of age, was convicted in the Hustings Court of the City of Richmond (now Circuit Court of the City of Richmond, Division I) of the unauthorized use of a neighbor's automobile. He was represented at this trial by a lawyer appointed by the Court because he was unable to afford privately-retained counsel. As a result of this conviction, the Virginia Division of Motor Vehicles suspended his privilege to operate a motor vehicle for one year. No contention is advanced

herein that this conviction, or the subsequent suspension of petitioner's driving privileges, suffers from any legal or constitutional infirmity.

Thereafter, on August 12, 1971, after the expiration of the period for which his driving privileges had been suspended, but before he had taken the appropriate steps for revalidation of his operator's permit, Mr. Harris was convicted in the County Court of Charles City County (now General District Court of Charles City County) of operating a motor vehicle while his privilege to do so was still suspended. He was sentenced to pay a fine and to serve a term in jail, but no additional suspension of his driving privileges was imposed. Mr. Harris was not afforded representation by an attorney in this instance, although he was indigent and unable to retain a

lawyer on his own behalf, and he did not waive his right to the assistance of counsel. This conviction is absolutely void because it was obtained in clear violation of petitioner's constitutional right to assistance of counsel.

Shortly after this second conviction, on September 1, 1971, Mr. Harris was convicted again of operating a motor vehicle while his privilege to do so had been suspended. At his trial in the Traffic Court of the City of Richmond (now General District Court of the City of Richmond, Traffic Division) petitioner was not afforded counsel, although he could not pay for one himself, and he did not waive his right to the assistance of counsel. This time conviction brought with it a fine, a suspended jail term and the revocation of his driving privileges for another year. This

conviction is also absolutely void, because it was obtained in clear violation of Mr. Harris' constitutional right to assistance of counsel.

Your petitioner then became subject to proceedings under the Virginia Habitual Offender Action, Section 46.1-387.1, et seq, of the 1950 Code of Virginia, as amended, which provides, inter alia, that any person who is convicted within a ten-year period of three or more separate offenses involving motor vehicles, as listed in the act, shall be adjudged an habitual offender and suffer the loss of his driving privileges for a period of at least ten years. The penalty for violating this prohabition is extremely severe, and includes a mandatory prison sentence.

Thereafter, a certified transcript of Mr. Harris' conviction record, as maintained at the Virginia Division of Motor Vehicles, was forwarded to the Commonwealth's Attorney for the City of Richmond. On April 24, 1974, a judge in the Circuit Court of the City of Richmond, Division I, entered an order requiring petitioner to show cause as to why he should not be adjudged an habitual offender against the motor vehicle laws of the Commonwealth and suffer the consequences provided by law.

At the hearing on the show cause order, petitioner admitted that the transcript of his conviction record, which was filed as an exhibit for the Commonwealth, was accurate. He interposed the defense, however, that the statute involved required a minimum of three convictions of offenses involving

motor vehicles, and since two of his three convictions were misdemeanors for which the sentence included incarceration, at the trial of which petitioner was not afforded counsel, nor advised of his right to counsel, nor did he waive his right to such representation, that these two convictions were wholly void for the purposes for which they were being utilized in the instant proceeding. The trial judge considered this defense, but ruled that the two convictions in question were not void for purposes of the habitual offender proceeding, because they occurred prior to this Court's ruling in Argersinger v. Hamlin, 407 U.S. 25 (1972), and the judge declined to give retrospective effect to this decision. To all of this, petitioner duly objected and excepted. The trial court then proceeded to adjudge Mr. Harris to be an habitual offender, entering the order of judgment on July 3, 1974, nunc pro tunc to June 26, 1974.

On July 25, 1974, Mr. Harris filed a timely Notice of Appeal and Assignments of Error, duly reiterating in paragraph number 2 thereof that the habitual offender adjudication was invalid because it was based in material part upon two convictions which were void because they had been obtained in violation of his right to assistance of counsel.

Petitioner's Petition for a Writ of Error and Supersedeas which was timely filed after his Notice of Appeal and Assignments of Error was ultimately denied by the Supreme Court of Virginia on May 9, 1975, thus affirming the trial court's decision.

REASONS FOR GRANTING THE WRIT

Among the more important considerations governing a determination by this Court as to whether it should grant certiorari in a case such as the one at bar are whether the decision of the state court which is complained of has resulted in a determination by that court of a federal question of substance not heretofore determined by this Court, or which has resulted in a decision by the state court not in accord with applicable decisions of this Court. An additional important consideration which is pertinent here is whether or not there is a conflict among the decisions of the United States Courts of Appeals on the issue which is the basis for the request for a writ of certiorari. These criteria apply quite emphatically to the question presented in this petition.

The foundation for the issue which is central to the case at bar was laid in the seminal case of Gideon v. Wainwright, 372 U.S. 335 (1963), by which this Court established the right to counsel rule in all felony cases. In Argersinger v. Hamlin, 407 U.S. 25 (1972), this Court took the next logical step by extending this right to all petty and misdemeanor cases involving the possibility of incarceration upon conviction. For a short time after this decision, it remained unclear whether this extension of the right to counsel was to be given retrospective effect. This Court resolved that question in Berry v. City of Cincinnatti, 414 U.S. 29 (1973), by deciding, per curiam, that this important right was to be extended retrospectively.

The instant case, then, raises the very important issue of whether or not the retrospective effect given Argersinger by the Berry case includes the collateral consequences flowing from a pre-Argersinger misdemeanor conviction involving a jail sentence wherein the conviction was obtained against a defendant who was neither afforded, nor waived his right to, counsel.

This perplexing question has created a split in decisions, both among the various Circuit Courts of Appeals (compare, e.g. Clay v. Wainwright, 470 F.2d 478 (5th Cir.1972) with Marston v. Oliver, 485 F.2d 705 (4th Cir.1973), and even between different panels of the United States Court of Appeals for the Fourth Circuit. (Compare, e.g., Ferguson v. Gathright, 485 F.2d 504 (4th

Cir.1973) with Mays v. Harris, ____F.2d ____(4th Cir.1975; Docket No. 74-1409) reversing 369 F.Supp. 1348 (W.D.Va.1973)). Furthermore, there is a difference of opinion between the Supreme Court of Virginia and some panels of the United States Courts of Appeals for the Fourth and Fifth Circuits. (See, e.g., Whorley v. Commonwealth, 215 Va.___, 215 S.E.2d ____(1975) (Record No. 740940) as well as that court's decision in petitioner's own case.

This Court held in Argersinger that without a waiver "no person may be imprisoned for any offense. . .unless he was represented by counsel at his trial." 407 U.S. at 37. Before this Court clarified that decision in Berry, it was possible to argue that any retroactive application of Argersinger should go no

further than to invalidate any sentence of incarceration received by an uncounseled misdemeanant, thus leaving the conviction itself intact for other purposes. See, e.g., Marston, supra. In Berry, however, this Court declared that a pre-Argersinger misdemeanant was "entitled to the constitutional rule enunciated in that case" if he could "allege and prove a bona fide, existing case or controversy sufficient to invoke the jurisdiction of a federal court." 414 U.S. at 29-30. In explanation of "case or controversy" this Court cited three habeas corpus decisions holding that a petitioner could still challenge his conviction after full service of his sentence so long as there remained potential for "collateral consequences" from the conviction. Sibron v. New York,

392 U.S. 40, 50-58 (1968); Carafas v. LaVallee, 391 U.S. 234, 237-38 (1968); Ginsberg v. New York, 390 U.S. 629, 633-34 n.2 (1968).

To make clear "the constitutional rule" of Argersinger, this Court cited its decisions on retroactive applications of the rule enunciated in Gideon v. Wainwright, supra, indicating that uncounseled felony convictions were wholly "void." See, e.g., Burgett v. Texas, 389 U.S. 109, 114 (1967). The clear thrust of these decisions is that a pre-Argersinger misdemeanant who received a prison sentence without counsel is entitled not only to relief from any remaining sentence, but to have his conviction voided for any and all purposes whatsoever. Mays v. Harris, supra.

Petitioner contends that his two uncounseled misdemeanor convictions which resulted in jail sentences are void under the doctrine of Argersinger and Berry, and that his 1974 Habitual Offender Order is void, because there are not sufficient valid convictions to sustain it. Section 46.1-387.2 of the 1950 Code of Virginia, as amended.

In reviewing this contention the Supreme Court of Virginia rejected Petitioner's argument,apparently ruling that Argersinger affected only jail sentences, not convictions. Whorley v. Commonwealth, supra.

This reasoning is plainly at odds with the reasoning of Argersinger, and with the clear mandate of Berry, supra. See also Cottle v. Wainwright, 477 F.2d 269 (5th Cir.1973) and 493 F.2d 397 (5th Cir.1974). In those cases, it is

clear that the threat of a jail sentence is the catalyst which brings the right to counsel rule into effect, and that any conviction obtained in the absence of counsel is void because the defendant did not have a full and fair opportunity to test the State's evidence, in violation of the due process clause of the Fourteenth Amendment.

This Court has long held that a felony conviction obtained without counsel is void, Loper v. Beto, 405 U.S. 473 (1966), even if the sentence has been fully served and the only consequences remaining are collateral. Sibron v. New York, 392 U.S. 40 (1968); see also O'Shea v. United States, 491 F.2d 774 (1st Cir.1974).

The United States Court of Appeals for the Fifth Circuit has correctly ruled

that a pre-Argersinger uncounseled misdemeanor conviction that led to the petitioner's parole could not result in the same petitioner's revocation of parole since the underlying conviction was void. Clay v. Wainwright, supra.

The analogy to the present case is precise. This petitioner's habitual offender status, like Clay's parole status, grew out of his uncounseled misdemeanor convictions. And petitioner's status like Clay's probation revocation, would not exist, but for the void convictions. See also Gagnon v. Scarpelli, 411 U.S. 778 (1973); Mempha v. Rhay, 389 U.S. 128 (1967).

Furthermore, Mr. Harris, in the case at bar, does not suffer from the infirmities so ably listed in Mays v. Harris, supra and Whorley v. Commonwealth, supra,

both of which cases are, or soon will be, subjects of petitions in this Court for Writs of Certiorari. Each of those cases involved a defendant in a criminal proceeding, who had been adjudged an habitual offender in earlier proceedings, based upon one or more convictions which were void under Argersinger and Berry. Each defendant accepted this status without challenge, and then proceeded to ignore the injunction by deliberately continuing to drive. These two defendants only raised the issue of the validity of their underlying uncounselled misdemeanor convictions in the context of defending themselves against criminal prosecution and a mandatory prison term for violation of the habitual offender orders entered against them. This clearly distinguishes these cases from the instant case, where

petitioner raised his constitutional challenge at the earliest possible time, and is guilty of no deliberate violation of the law.

CONCLUSION

For the foregoing reasons, this petition should be granted, and a Writ of Certiorari should issue to the Supreme Court of Virginia forthwith.

Respectfully,

EUGENE VERNON HARRIS

By: _____
George Wm. Warren, IV
Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33(1) and (3)(b), of the Rules of the Supreme Court of the United States, this will certify that 3 true and exact copies of the foregoing Petition for a Writ of Certiorari was hand-delivered to Aubrey R. Davis, Esq., Commonwealth's Attorney for the City of Richmond, Court's Building, 1001 East Broad Street, Richmond, Virginia 23219, he being counsel of record for the respondent, this 7th day of August, 1975.

_____
George Wm. Warren, IV
Counsel for the Petitioner

A P P E N D I X

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of May, 1975.

The petition of Eugene Vernon Harris for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Richmond, Division I, on the 3rd day of July, 1974, nunc pro tunc as of the 26th day of June, 1974, in a prosecution by the Commonwealth against the said petitioner under the Virginia Habitual Offender Act, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit

court.

A Copy,

Teste:

Record No. 741080 Howard G. Turner,
Clerk

By: Allen L. Lucy
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I,

THE 3rd DAY OF July, 1974

The following order of June 26, 1974 is this day entered NUNC PRO TUNC.

Commonwealth

vs. Information to Show Cause

EUGENE VERNON HARRIS, H-85

The said defendant having been duly served with notice of these proceedings, he this day appeared

And having heard the evidence, the Court doth find that the said Eugene Vernon Harris is the same person named in the information and abstract and that he is an habitual offender of the motor laws of this State, as set forth under Article 7, of Chapter 5 of Title 46.1 of the Code of Virginia, it is directed that the said Eugene Vernon Harris is not to operate a motor vehicle on the highways of this State. And he is to surrender to the Court any and all licenses and permits to operate a motor vehicle on the highways of this State.

And after the expiration of ten years the defendant may petition a court of record for restoration of his privilege of operating a motor vehicle as set forth in Section 46.1-387.9 of the Code of Virginia.

And the said Eugene Vernon Harris is hereby advised that operation of a motor vehicle after having been declared an habitual offender is punishable by a mandatory one (1) to five (5) year penitentiary sentence, and confiscation of the motor vehicle.

And the Clerk of this Court is to certify a copy of this order to the Commissioner of the Division of Motor Vehicles, 2220 West Broad Street, Richmond, Virginia, 23210, and to the said Eugene Vernon Harris at his last known address.

Enter: James M. Lumpkin
James M. Lumpkin Judge

A Copy,
Teste: EDWARD C. KIDD, Clerk
By Virginia Jinnette D.C.

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Constitution of the United States of America, Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Constitution of the United States of America, Fourteenth Amendment, Section Six:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Virginia Habitual Offender Act, Section 46.1-387.1 et seq of the 1950 Code of Virginia, as amended:

§ 46.1-387.2 Habitual offender defined.—An habitual offender shall be any person, resident or nonresident, whose record, as maintained in the office of the Division of Motor Vehicles, shows that such person has accumulated the convictions, or findings of not innocent in the case of a juvenile, for separate and distinct offenses, described in subsection (a), (b) and (c), of this section, committed within a ten-year period, provided that where more than one included offense shall be committed within a six-hour period such multiple offenses shall, on the first such occasion, be treated for the purposes of this article as one offense provided the person charged has no record of prior offenses chargeable under this article, and provided further the date of the offense most recently committed occurs on or after June twenty-eight, nineteen hundred sixty-eight, and within ten years of the date of all other offenses the conviction for which is included in subsections (a), (b) or (c) as follows:

(a) Three or more convictions, or findings of not innocent in the case of a juvenile, singularly or in combination, of the following separate and distinct offenses arising out of separate acts:

(1) Voluntary or involuntary manslaughter resulting from the operation of a motor vehicle;

(2) Driving or operating a motor vehicle while under the influence of intoxicants or drugs in violation of § 18.1-54;

(3) [Repealed.]

(4) Driving a motor vehicle while his license, permit or privilege to drive a motor vehicle has been suspended or revoked in violation of §§ 18.1-60, 46.1-350 or 46.1-351;

(5) [Repealed.]

(6) Knowingly making any false affidavit or swearing or affirm-

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ing falsely to any matter or thing required by the motor vehicle laws or as to information required in the administration of such laws in violation of § 46.1-15;

(7) Any offense punishable as a felony under the motor vehicle laws of Virginia or any felony in the commission of which a motor vehicle is used;

(8) Failure of the driver of a motor vehicle involved in an accident resulting in the death or injury of any person to stop close to the scene of such accident and report his identity in violation of § 46.1-176; or

(9) Failure of the driver of a motor vehicle involved in an accident resulting only in damage to an attended or unattended vehicle or other property in excess of two hundred fifty dollars to stop close to the scene of such accident and report his identity or otherwise report such accident in violation of law.

(b) Twelve or more convictions, or findings of not innocent in the case of a juvenile, of separate and distinct offenses, singularly or in combination, in the operation of a motor vehicle which are required to be reported to the Division of Motor Vehicles and the commission whereof requires the Division of Motor Vehicles or authorizes a court to suspend or revoke the privilege to operate motor vehicles on the highways of this State for a period of thirty days or more and such convictions shall include those offenses enumerated in subsection (a) above when taken with and added to those offenses described herein.

(c) The offenses included in subsections (a) and (b) hereof shall be deemed to include offenses under any valid town, city or county ordinance paralleling and substantially conforming to the State statutory provisions cited in subsections (a) and (b) hereof and all changes in or amendments thereof, and any federal law, any law of another state or any valid town, city or county ordinance of another state substantially conforming to the aforesaid State statutory provisions.

(d) Any person twenty-one years of age, or older who has been adjudged an habitual offender based in whole or in part on findings of not innocent as a juvenile may petition the court in which he was found to be an habitual offender, or any circuit court in Virginia having criminal jurisdiction in the political subdiviision in which such person now resides, for restoration of his privilege to operate a motor vehicle in this State. Upon such petition, and for good cause shown, such court may, in its discretion, restore to such person the privilege to operate a motor vehicle in this State upon such terms and conditions as the court may prescribe, subject to other provisions of law relating to the issuance of operators' or chauffeurs' licenses.

§ 46.1-387.4. Information to be filed by attorney for Commonwealth.—The attorney for the Commonwealth, upon receiving the aforesaid transcripts or abstracts from the Commissioner, shall forthwith file information against the person named therein in the court of record having jurisdiction of criminal offenses in the political subdivision in which such person resides. In the event such person is a nonresident of this State, the attorney for the Commonwealth of the city of Richmond shall file information against the accused person in the Circuit Court of the city of Richmond. The clerk of the Circuit Court of the city of Richmond shall be allowed a fee of five dollars for each such information filed against such nonresident accused to be paid out of the State treasury from the appropriation for criminal charges on the certificate of the court as provided in § 19.1-317 and to be taxed against the defendant as a part of the costs of such proceeding, if the defendant is found to be an habitual offender. In the event the accused is an inmate of the Virginia State Penitentiary, jurisdiction for the proceedings shall be as provided in § 53,295.

§ 46.1-387.6. Order of court.—If the court finds that such person is not the same person named in the aforesaid transcript or abstract, or that he is not an habitual offender under this article, the proceeding shall be dismissed, but if the court finds that such person is the same person named in the aforesaid transcript or abstract and that such person is an habitual offender, the court shall so find and by appropriate order direct such person not to operate a motor vehicle on the highways of the Commonwealth of Virginia and to surrender to the court all licenses or permits to operate a motor vehicle on the highways of this State for disposal in the manner provided in § 46.1-425. The clerk of the court shall file with the Division of Motor Vehicles a copy of such order which shall become a part of the permanent records of the Division.

§ 46.1-387.8. Operation of motor vehicle by habitual offender prohibited; penalty; enforcement of section.—It shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect, except that such an order shall not operate to prevent or prohibit such person from operating a farm tractor upon the highways when it is necessary to move such tractor from one tract of land used for agricultural purposes to another tract of land used for the same purposes, provided that the distance between the said tracts of

land shall not exceed five miles. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years and no portion of such sentence shall be suspended, except that in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this State. If the court deetermines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial.

land shall not exceed five miles. Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years and no portion of such sentence shall be suspended, except that in cases wherein such operation is necessitated in situations of apparent extreme emergency which require such operation to save life or limb, said sentence, or any part thereof may be suspended.

For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this State. If the court deetermines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

COMMONWEALTH OF VIRGINIA, Petitioner,

v. DOCKET NO. H-85

EUGENE VERNON HARRIS, Respondent.

NOTICE OF APPEAL

Respondent, Eugene Vernon Harris, by counsel, pursuant to Rule 5:19(b) of the Rules of the Supreme Court of Virginia, hereby gives notice of his intention to apply to the Supreme Court of Virginia for a Writ of Error and Supersedeas to the opinion of the Honorable James M. Lumpkin, Judge entered nunc pro tunc on the 3rd day of July 1974, in the Circuit Court of the City of Richmond, Division I.

ASSIGNMENTS OF ERROR

The Respondent hereby assigns the following as error:

1. That the proceeding under Sections 46.1-387.1, et. seq., of the 1950 Code of Virginia, as amended, is unconstitutional as it was applied to the Respondent in this case because it was bottomed upon technical violations of traffic regulations which were not concerned with the safe operation of motor vehicles on the highways of the Commonwealth, and therefore was not reasonably related to any legitimate statutory purpose.

2. That the determination complained of is violative of Respondent's constitutional rights because one or more of the convictions upon which said determination was based were obtained in violation of Respondent's constitutional rights in that he was not afforded counsel nor advised of his right to obtain the assistance of same prior to trial nor informed of the grave implications of such conviction because of its exposure of him to subsequent proceedings under the provision of Virginia law relating to habitual offenders against the motor vehicle laws of the Commonwealth.

LAW OFFICES
HALL, HALL & WARREN
606 HERITAGE BUILDING
1001 E. MAIN STREET
RICHMOND, VIRGINIA 23219

3. That the determination complained of is violative of Respondent's constitutional rights because Respondent's conviction upon his guilty plea to the charge of unauthorized use of a motor vehicle ~~as~~ is also one of the convictions upon which the instant proceeding was based as unconstitutional because he was not given the effective assistance of counsel in that he was not advised of the possibility that said conviction could result in a subsequent proceeding against him as an habitual offender against the motor vehicle laws of the Commonwealth.

4. That the determination of the Court that the Respondent met the intended definition of an habitual offender against the motor vehicle laws of the Commonwealth is incorrect as a matter of law because three of the offenses upon which the finding was based grew out of a single offense and therefore he had not, in fact, accumulated a sufficient number of convictions to bring his conduct within the terms of the statute.

5. That the Court abused its discretion in failing to certify the questions raised as to the constitutional inadequacy of the convictions of the Respondent in Traffic Court to those courts for a determination thereof, although such motion was duly made by counsel.

STATEMENT

COMES NOW the Respondent, pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia and states that a statement of facts and other incidents of trial is to be hereafter filed in the Office of the Clerk pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia.

Respectfully,

EUGENE VERNON HARRIS

By Counsel

George Wm. Warren, IV

LAW OFFICES
HALL, HALL & WARREN
606 HERITAGE BUILDING
1001 E. MAIN STREET
RICHMOND, VIRGINIA 23219

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CERTIFICATE

This is to certify that I have this 25th day of July 1974, hand-delivered, a true and exact copy of the foregoing Notice of Appeal, Assignments of Error and Statement to J. Thomas McGrath, Esquire, Assistant Commonwealth Attorney for the City of Richmond, 1001 East Broad Street, Richmond, Virginia 23219, counsel of record for the Petitioner.

George Wm. Warren, IV

LAW OFFICES
HALL, HALL & WARREN
900 HERITAGE BUILDING
1001 E. MAIN STREET
RICHMOND, VIRGINIA 23219

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND, DIVISION I

COMMONWEALTH OF VIRGINIA, Petitioner,

v. DOCKET NO. H-85

EUGENE VERNON HARRIS, Respondent.

NARRATIVE

The following transcript of testimony is herewith ORDERED filed pursuant to Rule 5:9(c)(ii) of the Rules of the Supreme Court of Virginia, to become a part of the record herein.

On June 26, 1974, the above-captioned matter came forward for a hearing on the merits pursuant to a show cause order, having been duly entered against the respondent, requiring him to show cause, if any he could, why he should not be prohibited from operating a motor vehicle on the highways of the Commonwealth of Virginia and be required to surrender to the Court or the Commonwealth any and all licenses or permits to operate any motor vehicle on the highways of the Commonwealth of Virginia, all in accordance with Sections 46.1-387.1, et seq., of the 1950 Code of Virginia, as amended.

The Honorable James M. Lumpkin, Judge in the Circuit Court of the City of Richmond, Division I, presided. J. Thomas McGrath, Esquire, Assistant Commonwealth's Attorney for the City of Richmond, represented the Commonwealth. George Wm. Warren, IV, Esquire, represented the respondent. The respondent, Eugene Vernon Harris, was present in person.

The aforementioned show cause order was introduced into evidence on motion of the Commonwealth. A certification pursuant to Section 46.1-34.1 of the 1950 Code of Virginia, as amended, was then introduced into evidence, with attached abstracts, showing, inter alia, that the respondent had been convicted in the Hustings Court of the City of Richmond on January 14, 1969,

of unauthorized use of an automobile, that he had been convicted in the County Court of Charles City County on August 12, 1971, of operating a motor vehicle on the public highways while his privilege to do so had been suspended, and that he had been convicted in the Traffic Court of the City of Richmond on September 1, 1971, of driving while his privilege to do so had been suspended.

The respondent, by counsel, agreed that he was in fact the one and same person indicated in the abstracts and the certificate introduced into evidence, and that the convictions had, in fact, been obtained as indicated therein.

Counsel for the respondent made a proffer of proof to the effect that the respondent would testify that with regard to the first offense, he had pled guilty to the unauthorized use of an automobile without having received effective assistance of counsel, in that his court-appointed counsel had failed to advise him of the possible implications of his guilty plea with regard to a future proceeding against him under the provisions of Sections 46.1-387.1, et seq., of the 1950 Code of Virginia, as amended, and that the court had not advised him of such consequences either, all of which would appear of record in the very same court in which the present proceeding was taking place. Counsel for the respondent then argued that the proceeding for the revocation of the respondent's driving privileges, as required under the aforementioned statute, must fail because the aforementioned underlying conviction was void for the present purposes on account of ineffective representation of counsel.

Counsel for the respondent also proffered that respondent would testify that the second and third convictions, upon which the present proceeding was based, with regard to his operation of a motor vehicle when his privilege to do so had been revoked in one instance and suspended in another, that on those

occasions he had not been advised of his right to secure assistance of counsel, that he could not afford to retain one at his own expense, and that he did not waive his right to such counsel. Accordingly, counsel argued that the present proceeding must fail for the reason that if any of the underlying convictions was obtained in violation of the respondent's Constitutional rights, that a proceeding based upon said conviction must also fail.

Lastly, counsel for the respondent argued that the statute under which the Commonwealth was proceeding against the respondent was unconstitutional as it was being applied to the respondent because the same was not reasonably related to the purpose for which the statute was inacted, which purpose is recited in the preamble to the said statute, because none of the offenses of which the respondent was guilty involved any action on his part which endangered the lives and/or property of others on the highways of the Commonwealth.

The Court ruled that the application of decisions of the United States Supreme Court which might render void any or all of the convictions underlying the present proceeding were not retrospective in their application, and therefore, without ruling on the constitutionality of those convictions, the same would not be any basis for a dismissal of the present action.

The Court also ruled that the statute in question as applied to the respondent in this case was not unconstitutional and that the same was not vulnerable to attack as not being reasonably related to the purpose for which it was enacted, and accordingly, found the same to be constitutional as to this aspect thereof.

Counsel for the respondent then made a motion that, pursuant to the statute which was the basis for the present action, the trial court certify the questions as to the propriety of respondent's convictions in each of the three underlying

offenses to the Court involved with instructions to make a finding as to whether or not the respondent was properly advised of his rights, etc. The attorney for the Commonwealth opposed such motion, and the Court ruled that it would not certify any such questions to any of the lower Courts.

The Court then found that the respondent, Eugene Vernon Harris, was an habitual traffic offender as defined under Sections 46.1-387.1, et seq., of the 1950 Code of Virginia, as amended, and directed that his privilege to operate a motor vehicle in the Commonwealth of Virginia be revoked pursuant thereto.

To all of the foregoing counsel for the respondent respectfully objected and excepted of record.

APPROVED:

_____
Judge

We have seen and approved this narrative:

_____, p.q.
J. Thomas McGrath, Esquire
ROBERTSON & McGRATH
427 N. Addison Street
Richmond, Virginia 23220

_____, p.d.
George Wm. Warren, IV
HALL, HALL & WARREN
Suite 206, Heritage Building
1001 E. Main Street
Richmond, Virginia 23219

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Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-205

Eugene Vernon Harris,

Petitioner,

v.

Commonwealth of Virginia,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

George Wm. Warren, IV
HALL, HALL & WARREN
1001 East Main Street
Richmond, Virginia 23219
Counsel for Petitioner

TABLE OF CONTENTS

	Page
Reasons for Granting the Writ....	2
Conclusion.....	7
Certificate.....	8
Appendix.....	9

TABLE OF AUTHORITIES

CASES	PAGE
Argersinger v. Hamlin, 407 U.S. 25 (1972).....	5
Berry v. City of Cincinnati, 414 U.S. 29 (1973).....	5
Mays v. Harris, ___F.2d___, (4th Cir.1975; Docket No. 74-1409) reversing 369 F. Supp.1348 (W.D.Va.1973).....	2,5,6
Walker v. Birmingham, 388 U.S. 307 (1967).....	5,6
Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447 (1975).....	3

In The

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SUPPLEMENTAL
PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

COMES NOW your petitioner, Eugene Vernon Harris, by his counsel, George Wm. Warren, IV, pursuant to Rule 24(5) of the Rules of the Supreme Court of the

United States, and presents this supplemental petition for the issuance of a Writ of Certiorari to the Supreme Court of Virginia.

REASONS FOR GRANTING THE WRIT

In his initial petition for a writ of certiorari, your petitioner cited the case of Mays v. Harris, ____F.2d____, (4th Cir.1975; Docket No. 74-1409) reversing 369 F.Supp. 1348 (W.D.Va.1973) which had been decided on June 25, 1975. Since then, however, that opinion has been withdrawn for reconsideration and a new opinion substituted therefor, which was filed on August 25, 1975. In order to insure that this Honorable Court has completely accurate references before it, petitioner is filing the within supplemental petition for a writ of certiorari, along with a supplemental appendix thereto, wherein this new opinion is reproduced in its entirety. (See page 10,App.)

Your petitioner indicated in his initial petition that both the Mays case and the case of Whorley v. Commonwealth, 215 Va. 740, 214 S.E.2d 447 (1975) were soon to be the subjects of petitions for review in this Honorable Court. It is the petitioner's belief that one or both of these cases is now before this Court.

These cases are brought to the Court's attention because both their reasoning and their facts are vitally important to a proper determination of this petitioner's case, albeit in differing fashion. First and foremost, both of these cases vary factually from the case at bar in one especially important particular. In each of them the petitioner was adjudged an habitual offender against the motor vehicle laws of the Commonwealth of Virginia, just as your petitioner was, but neither Mays nor Whorley raised any

constitutional objection to such a determination at the time of the proceeding against him. The basis for their present claims was that each chose to ignore the Court's injunction against driving during a specified period, and only attacked his habitual offender status upon conviction of having violated such injunction. On the other hand, this petitioner raised his constitutional objection to any adjudication that he was an habitual offender within the context of the proceeding itself - and at the earliest possible time. That is, this petitioner, unlike the other two, has never been convicted of a violation of the injunction against his driving.

In view of the foregoing factual differences, your petitioner in the present matter is not vulnerable to the reasoning of the United States Court of

Appeals for the Fourth Circuit, in the Mays v. Harris decision, where that Court citing this Honorable Court's decision in the case of Walker v. Birmingham, 388 U.S. 307 (1967) determined that Mays was in no position to raise a constitutional objection to his conviction for having violated the Court's injunction against his driving, inasmuch as he had failed to raise this objection within the habitual offender proceeding itself. The Court reached this determination while conceding that Mays' constitutional attack upon the habitual offender proceeding itself was probably valid, in light of this Court's rulings in Argersinger v. Hamlin, 407 U.S. 25 (1972) and Berry v. City of Cincinnatti, 414 U.S. 29 (1973).

In further elicidating its decision, the Court stated that

> In Walker v. Birmingham, 388 U.S. 307 (1967), the Supreme Court upheld contempt of court convictions and punishment of civil rights demonstrators who had wilfully violated an apparently over-broad state court injunction against protest marches without first attempting to have it dissolved. The Court refused to allow the demonstrators to show invalidity of the injunction as a defense to the contempt citations, stating that 'they could not bypass orderly judicial review of the injunction before disobeying it.' 388 U.S. at 320.
>
> We believe the principle of Walker is fully applicable here. Mays can test his adjudication as an habitual offender, but he cannot with impunity choose to ignore the adjudication and resulting injunction for, as the Court said in Walker, 'in the fair administration of justice no man can be judge in his own case.' Id.

Mays v. Harris, supra, page 13, App.

The issues in the instant case are plain, clear and direct; the record is clean. Both the dilemma facing Eugene Vernon Harris and the wrong which has been done to him are apparent. This case cries

out for a remedy and this Honorable Court is the only instrumentality which can provide it. Here is a point of law of transcendent importance to persons in every walk of life across our nation. Justice demands a definitive ruling by this Court, at this time, in the context of this case.

CONCLUSION

For the foregoing reasons, this petition should be granted, and a Writ of Certiorari should issue to the Supreme Court of Virginia forthwith.

Respectfully,

EUGENE VERNON HARRIS

By: /s/ George Wm. Warren, IV
George Wm. Warren, IV
Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33(1) and (3)(b), of the Rules of the Supreme Court of the United States, this will certify that 3 true and exact copies of the foregoing Supplemental Petition for a Writ of Certiorari were mailed, first class, postage fully prepaid, to Aubrey R. Davis, Esq., Commonwealth's Attorney for the City of Richmond, Court's Building, 1001 East Broad Street, Richmond, Virginia 23219, he being counsel of record for the respondent, this 24th day of September, 1975.

/s/ George Wm. Warren, IV
George Wm. Warren, IV
Counsel for the Petitioner

A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 74-1409

Curtis Mays,

Appellee,

versus

William Harris,
Sheriff Nelson County,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. Ted Dalton, District Judge.

Argued February 4, 1975; Opinion of June 25, 1975, Withdrawn. Opinion Filed Upon Reconsideration: August 25, 1975

Before WINTER, CRAVEN, and WIDENER, Circuit Judges.

Robert E. Shepherd, Jr., Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, and Sam D. Eggleston, Jr., Attorney for the Commonwealth for the County of Nelson, on brief) for Appellant; William M. McClenny, Jr., for Appellee.

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CRAVEN, Circuit Judge:

On petition to reconsider, we withdraw our prior opinion and substitute the following:

On March 6, 1970, the Circuit Court of Nelson County, Virginia, adjudged Curtis Mays to be an habitual offender of the Commonwealth's motor vehicle laws because of his four misdemeanor convictions within seven years. The court directed Mays to surrender his driver's license and not to operate a motor vehicle in Virginia. Mays did not appeal. On June 4, 1973, the same court convicted Mays of having twice violated Virginia law[1] by operating a motor vehicle

---

1. Va. Code Ann. § 46.1-387.8:

> Operation of motor vehicle by habitual offender prohibited; penalty; enforcement of section.-- It shall be unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect, ... Any person found to be an habitual offender under the provisions of this article who is thereafter convicted of operating a motor vehicle in this State while the order of the court prohibiting such operation is in effect, shall be punished by confinement in the penitentiary not less than one nor more than five years . . . .
>
> For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing such charge shall determine whether such person has been held an habitual offender and by reason of such holding is barred from operating a motor vehicle on the highways of this State. If the court determines the accused has been so held, it shall certify the case to the court of record of its jurisdiction for trial.

while classified as an habitual offender and sentenced him to one year in jail for each violation. Mays did not appeal to the Supreme Court of Virginia, but instead sought a writ of habeas corpus from the United States District Court for the Western District of Virginia.[2]

On October 2, 1973, the district court entered an opinion and judgment declaring the 1970 habitual offender adjudication a nullity because two of the four underlying convictions, both in 1969, were invalid because Mays was tried and imprisoned without counsel and without having waived counsel. Argersinger v. Hamlin, 407 U.S. 25 (1972). The district judge reasoned that the nullity of the 1970 adjudication necessarily voided the 1973 convictions for driving while adjudged an habitual offender and ordered that Mays be released. We reverse because the sentence about which Mays complains does not depend on the validity of his underlying convictions.

The 1973 convictions that Mays now attacks did not follow directly and inexorably from the earlier adjudication: a new element was essential--that he drive a motor vehicle in the face of an order forbidding that he do so. The Circuit Court of Nelson County had enjoined Mays "not

---

2. Mays did institute an appeal after filing his habeas petition, and we have been informed by the Assistant Attorney General of Virginia that the state supreme court has decided the appeal against Mays. State remedies have thus been exhausted.

to operate a motor vehicle on the highways of the Commonwealth of Virginia," but Mays chose to ignore the injunction. The statute under which he was subsequently convicted makes it "unlawful for any person to operate any motor vehicle in this State while the order of the court prohibiting such operation remains in effect." Va. Code Ann. § 46.1-387.8 (emphasis added). Mays was convicted and sentenced, therefore, not because he was an adjudged habitual offender, but because he wilfully and flagrantly violated an extant court order.

In Walker v. Birmingham, 388 U.S. 307 (1967), the Supreme Court upheld contempt of court convictions and punishment of civil rights demonstrators who had wilfully violated an apparently overbroad state court injunction against protest marches without first attempting to have it dissolved. The Court refused to allow the demonstrators to show invalidity of the injunction as a defense to the contempt citations, stating that "they could not bypass orderly judicial review of the injunction before disobeying it." 388 U.S. at 320.

We believe the principle of Walker is fully applicable here. Mays can test his adjudication as an habitual offender, but he cannot with impunity choose to ignore the adjudication and resulting injunction for, as the Court said in Walker, "in the fair administration of justice no man can be judge in his own case." Id.

In requiring obedience to court orders until vacated, we support the salutary state policy of protecting the public from potentially dangerous drivers. If a traffic offender like Mays should successfully attack his status on the basis of Argersinger, the state may then elect to provide him with counsel and retry him for the underlying offenses in order to reimpose the habitual offender status and keep him off the highway. To permit one who has been adjudged an habitual offender to disregard his status, however vulnerable, and later defend any conviction for doing so by asserting the invalidity of his underlying convictions is to allow him to judge his own case. That he may not do. Walker, supra.

REVERSED.

WIDENER, Circuit Judge, concurring:

I concur in the result for the reasons expressed by Mr. Justice Harrison in Whorley v. Commonwealth, No. 740490, _____Va._____, _____SE2d_____ (April 28, 1975), a case on all fours with the case before us.

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Supreme Court, U. S.
FILED
NOV 5 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-205

EUGENE VERNON HARRIS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Judgment of the Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

STUART BATEMAN
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE AND PRIOR PROCEEDINGS	2
ARGUMENT	4
CONCLUSION	10

TABLE OF CITATIONS

Cases

Argersinger v. Hamlin, 407 U.S. 25 (1972)	2, 3, 4, 5, 6, 7, 8, 9
Berry v. Cincinnati, 414 U.S. 29, 30 (1973)	4, 5, 7, 9
Carafas v. LaVallee, 391 U.S. 234 (1968)	5
Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972)	8
Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973)	8
Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973)	6
Ginsberg v. New York, 390 U.S. 629 (1968)	5
Huffman v. Commonwealth, 210 Va. 530, 172 S.E.2d 788 (1970)	6
Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973)	7
Mays v. Harris, ___ F.2d ___, Case No. 74-1409 (4th Cir. 1975)	7
Morgan v. Juvenile and Domestic Relations Court, 491 F.2d 456 (4th Cir. 1974)	7

Potts v. Superintendent, 213 Va. 432, 192 S.E.2d 780 (1970)..... 3

Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941)..... 6

Sibron v. New York, 392 U.S. 40 (1968)..... 5

Whorley v. Commonwealth, 215 Va. 740, ___ S.E.2d ___ (1975)..... 3, 4, 6, 7

Other Authorities

28 U.S.C. § 1257(3)..... 2

U.S. Constitution, Sixth Amendment..... 4

U.S. Constitution, Fourteenth Amendment..... 4

§§ 46.1-387.1, et seq., Code of Virginia (1950), as amended..... 4

Note, "The Virginia Habitual Offender Act," 26 Wash.& Lee L.Rev. 271 (1969)..... 6

IN THE

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COMMONWEALTH OF VIRGINIA,

Respondent

Petition For a Writ of Certiorari to the Judgment of the Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, the Commonwealth of Virginia, respectfully prays that a writ of certiorari to the judgment of the Supreme Court of Virginia in this case of May 9, 1975, not be granted.

This petition results from a decision by the Supreme Court of Virginia of May 9, 1975, denying a petition for a writ of error

and supersedeas to a judgment rendered by the Circuit Court of the City of Richmond, Division I, of July, 1974. The denial of the petition is set forth in the appendix to the petition for a writ of certiorari previously filed in this Court, and it will not be reported. The judgment of the Circuit Court of the City of Richmond, Division I, which was the basis for the petitioner's unsuccessful petition to the Supreme Court of Virginia is also found in the appendix to the petition for a writ of certiorari, previously filed in this case, and it will not be reported.

JURISDICTION

The petitioner asserts that the jurisdiction of this Court to enter the writ of certiorari is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Is A Civil Proceeding, Wherein A Person Is Classified As An Habitual Traffic Offender And Which Does Not Result In The Direct Threat Of Incarceration, Subject To A Constitutional And Collateral Attack Under The Retroactivity Of The Rule Enunciated In Argersinger v. Hamlin, 407 U.S. 25 (1972), When The Underlying Misdemeanor Convictions Are Fully Served And Impose No Direct Threat Of Reincarceration?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in the instant case are fully set out in the petition for a writ of certiorari previously filed in the case.

STATEMENT OF THE CASE AND PRIOR PROCEEDINGS

The respondent Commonwealth agrees substantially with the statement of the case as it is set out in the petition for a writ of certiorari to the Supreme Court of Virginia, previously filed.

The petitioner is attacking proceedings under the Virginia Habitual Offender Act, §§ 46.1-387.1, et seq., Code of Virginia (1950), as amended, which requires that any person, convicted within a ten-year period of three or more specific categories of motor vehicle offenses, as listed in the Act, shall be adjudged an habitual offender and lose driving privileges for a period of at least ten years. Of the three convictions, mentioned in the petition for a writ of certiorari, the petitioner does not challenge his conviction of January 14, 1969. The respondent notes that of the remaining two convictions, the conviction of September 1, 1971, involved no actual jail sentence.

In the habitual offender proceeding in the Circuit Court for the City of Richmond, the petitioner argued that the second and third convictions were void for purposes of the habitual offender proceeding, because petitioner alleged that he was uncounseled and indigent. The trial court judge did not give retroactive effect to the constitutional rule enunciated in Argersinger v. Hamlin, 407 U.S. 25 (1972). At that time the Supreme Court of Virginia had not applied the decision in Argersinger, supra, retroactively. See Potts v. Superintendent, 213 Va. 432, 192 S.E.2d 780 (1970). Immediately prior to the time the Supreme Court of Virginia denied the petition for a writ of error to the judgment of the Circuit Court for the City of Richmond, the Court had rendered its decision in Whorley v. Commonwealth, 215 Va. 740, ___ S.E.2d ___ (1975), which is currently before this Court in a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia in Case No. 75-152.

In Whorley, however, the Supreme Court of Virginia did apply Argersinger retroactively, but the extent of the retroactive application was not extended in Virginia to situations, as in the instant case, where the term of imprisonment of the contested misdemeanor conviction has been served fully, and the only remaining effects of the misdemeanor conviction in question are totally collateral and involve no direct threat of imprisonment.

ARGUMENT

The Decision Of The Supreme Court Of Virginia To Deny A Writ of Error In This Case Is Correct, Since The Use Of An Uncounseled Misdemeanant Conviction In A Subsequent Civil Proceeding Where There Is No Direct Threat Of Imprisonment Does Not Violate The Rights Of A Defendant Under The Sixth And Fourteenth Amendments To The Constitution Of The United States.

The respondent does not contest here that Argersinger v. Hamlin, supra, holds that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petit, misdemeanor, or felony, unless he was represented by counsel at his trial." 407 U.S. 37. Nor is it contested that the decision must be given retroactive effect in cases where there is a case or controversy sufficient to invoke the jurisdiction of a Federal court. Berry v. Cincinnati, 414 U.S. 29, 30 (1973). Imprisonment without counsel, as Mr. Justice Douglas indicated in the concluding paragraph of his opinion, is voided:

> "The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy." 407 U.S. 40.

This petitioner does not face reincarceration as a result of either misdemeanor conviction like the petitioner in Berry, supra. Here the petitioner's second conviction did result in a ten-day jail sentence served long ago. The third conviction of September 1, 1971, which the petitioner challenges through his habitual offender determination, did not result in the loss of his liberty, and as such does not fit within the confines of the rule.

The petitioner further relies on Berry, supra, because of the cases cited by this Honorable Court with respect to the proposition that one, who asserts that he is entitled to the benefit of Argersinger, must allege and prove a bona fide existing case or controversy sufficient to invoke jurisdiction. These decisions, Sibron v. New York, 392 U.S. 40 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); and Ginsberg v. New York, 390 U.S. 629 (1968), dealt with the question whether a case, pending in this Honorable Court and dealing with a criminal conviction, becomes moot when the prisoner is released from custody. This Honorable Court concluded that the cause does not become mott, so long as the prisoner was in custody at the time of the initiation of the appeal and so long as there was some serious collateral consequence from the conviction that still adhered to the prisoner. For example, in Sibron, supra, this Court referred back to the earlier decision in Carafas and stated the following:

> "Only a few days ago we held unanimously that the writ of habeas corpus is avialable to test the constitutionality of a state conviction where the petitioner had been in custody when he applied for the writ, but had not been released before this Court could adjudicate his claim." 392 U.S. 51. (Emphasis added.)

Consequently, these three cases are inapplicable to the instant case, because the petitioner here is not "in custody" nor has he been "in custody" at any point because of his habitual offender determination. The petitioner has long since served the one misdemeanor conviction for which a jail sentence was imposed, and he did not attack those convictions directly. He is using the appellate process after the civil habitual offender determination as a vehicle to challenge the underlying convictions, and the distinction is that there is no direct threat of imprisonment as a result of either the determination or the underlying convictions. The misdemeanor convictions only affect the petitioner collaterally and do so in a civil action as opposed to a criminal action, since an habitual offender proceeding under Virginia law is a civil one and not a criminal one. See e.g., Huffman v. Commonwealth, 210 Va. 530, 172 S.E.2d 788 (1970); Prichard v. Battle, 178 Va. 455, 17 S.E.2d 393 (1941). See also Note, "The Virginia Habitual Offender Act," 26 Wash. & Lee L.Rev. 271 (1969). It is on the basis of this distinction that the Supreme Court of Virginia in Whorley v. Commonwealth, supra, while supporting the retroactivity of Argersinger, did not extend it to situations where the convictions themselves or imprisonment as a result thereof were not directly before the Court.

The law in Virginia is consistent with and relies upon opinions in the Fourth Circuit with respect to retroactivity. In Ferguson v. Gathright, 485 F.2d 504 (4th Cir. 1973), the Court rejected a contention that the civil description of the habitual offender proceedings was not determinative because of the criminal consequences

which could flow from driving a motor vehicle during the period of revocation. An habitual offender "comes under the threat of incarceration only if he subsequently determines to take the law into his own hands and to operate a motor vehicle on the public highway without a valid permit." 485 F.2d 506. The Court noted that the criminal consequences are not direct but collateral so that any consequences therefrom are entirely independent of the earlier adjudication as an habitual offender. Criminal consequences from the habitual offender determination develop only if the offender takes the additional step of driving after his license has been revoked, which is not the case here. The petitioner does not live under any direct threat of incarceration.

The Fourth Circuit gave retroactive application to Argersinger prior to this Court's decision in Berry, supra. See Marston v. Oliver, 485 F.2d 705 (4th Cir. 1973). Marston was reaffirmed subsequent to Berry, supra, in Morgan v. Juvenile and Domestic Relations Court, 491 F.2d 456 (4th Cir. 1974). The recent case of Mays v. Harris, ___ F.2d ___, Case No. 74-1409 (4th Cir. 1975), in which the Court of Appeals for the Fourth Circuit withdrew its first conflicting decision, does not affect the previous conclusions reached in Marston, supra, since Marston is never mentioned. The concurring opinion in Mays, supports the result for the reasons expressed by the Supreme Court of Virginia in Whorley, supra.

Although Marston, supra, was a habeas proceeding initiated while he was in custody, the facts are analogous to the facts in this case, since Marston had not been convicted of driving after his license had

been revoked. The Court of Appeals addressed contentions similar to that of the petitioner here by referring to the first decision of the United States Court of Appeals for the Fifth Circuit in Cottle v. Wainwright, 477 F.2d 269 (5th Cir. 1973). Where the effect of the uncounseled prior misdemeanor conviction was the automatic and immediate loss of liberty on the part of a defendant, the Fourth Circuit would apply retroactively the decision in Argersinger. Seen in this perspective, the case of Clay v. Wainwright, 470 F.2d 478 (5th Cir. 1972), is not necessarily inconsistent with the opinions in the Fourth Circuit and the Supreme Court of Virginia. The petitioner there actually faced reincarceration directly from the proceedings which he challenged, the parole revocation hearing, which made use of the prior conviction. The petitioner in this case faces no such direct threat, and it is submitted that the Fourth Circuit is correct in precluding retroactivity from a fully served sentence which has no direct criminal disabilities flowing from it.

Although there is a loss of the privilege of operating a vehicle on the highways of the State, it is the loss of a civil right in a subsequent civil proceeding. The habitual offender does not live under a threat by the State of incarceration nor are any fines imposed. The previous convictions in the habitual offender adjudication have only an indirect effect on the criminal process that may subsequently place the offender in peril of liberty by imprisonment. The paramount constitutional consideration of due process present in

a criminal context, where an individual is directly threatened with incarceration as a result of the misdemeanor conviction, is absent in the case of all civilly declared habitual offenders, and the respondent would submit no subtantial Federal question exists. While the right to counsel is necessitated in all criminal prosecutions where there is the threat of incarceration, the interest in retroactive application beyond this scope of Argersinger and Berry, supra, is not an issue which demands the discretionary application of the writ of certiorari. The uncounseled misdemeanant does not suffer the many serious collateral disabilities that an uncounseled felon does. When the substantial interest of the people of a state in safe highways, as expressed by the legislature of that state, is balanced, it mitigates against greater expansion of the rule. Furthermore, the near impossible task of the retrial of all uncounseled misdemeanants who received actual jail sentences should not be damanded merely to preserve the collateral effect.

It is submitted that the Supreme Court of Virginia was entirely correct in its decision to deny the petition for a writ of error and that this Court should exercise its discretion in a similar manner.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

STUART BATEMAN
Assistant Attorney General

Supreme Court-State Library Building
Richmond, Virginia 23219